92-1420

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GUY E. McGAUGHEY, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Court should overrule its earlier cases, decided in 1930 and 1931, to the extent that those cases support the position that a taxpayer's agreement to waive the statute of limitations, given in exchange for the agreement of the Government to consider an offer of compromise, creates a waiver even when the Government's promise is merely illusory.

2. Whether the cases referred to above should be clarified to avoid the obvious unfairness of enforcing the waiver by the taxpayer even though the Government gave nothing in return.

3. Whether the Court of Appeals misapprehended the facts in finding that the taxpayer's newly found evidence was in his possession at all times.

4. Whether the "Ferrell Rule" should have been applied to admit newly discovered evidence which clearly contradicted the Government's position.

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT AND IN THE UNITED STATES COURT OF APPEALS

The only parties in this matter, both in the United States District Court and in the United State Court of Appeals were:

Plaintiff: United States of America

Defendant: Guy E. McGaughey, Jr.

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CITATIONS TO OPINIONS BELOW

Plaintiff (hereinafter, the "Government") filed a single count complaint in the United States District Court for the Southern District of Illinois on December 22, 1987, against Guy E. McGaughey, Jr. (hereinafter "McGaughey" "Taxpayer"), seeking judgment against the Taxpayer for $2,368,068.00 plus interest from December 31, 1987, for tax assessments made against the Taxpayer in 1972 and 1977. (R. Doc. 1).

The Taxpayer filed an answer on February 6, 1988, containing a general denial and various affirmative defenses, including that the Government's claim was barred by the Statute of Limitations. (R. Doc. 6).

On May 23, 1990, the Government filed a motion for summary judgment. (R. Doc.

66). The Taxpayer filed a motion for summary judgment on July 16, 1990. (R. Doc. 71).

In a Memorandum and Order dated April 1, 1991, the District Court denied the Taxpayer's motion for summary judgment and granted the Government's motion for summary judgment. (R. Doc. 95). Judgment was entered against the Taxpayer in the amount of $3,410,060.07. (R. Doc. 96).

On April 11, 1991, the Taxpayer filed a motion to alter or amend judgment (R. Doc. 98). (R. Doc. 97).

On May 9, 1991, the Taxpayer filed his addition to the motion to alter or amend the judgment, to which were attached the affidavits of Guy E. McGaughey, Jr., and Andre Zigoris and a copy of the 1977 Offer in Compromise recently discovered by

the Taxpayer, in which the pre-printed waiver of the statute of limitations had been stricken. (R. Doc. 101). On May 16, 1991, the Taxpayer filed a supplemental affidavit in support of his motion to alter or amend judgment. (R. Doc. 102).

On May 22, 1991, the Government filed its response to the Taxpayer's motions. (R. Doc. 103, 104).

On July 10, 1991, the District Court denied the Taxpayer's motions to alter or amend the judgment and to reopen the judgment. (R. Doc. 106).

The Taxpayer filed a notice of appeal on August 7, 1991. (R. Doc. 107). On October 13, 1992, the United States Court of Appeals for the Seventh Circuit issued its Opinion affirming the District Court.

On October 27, 1992, Taxpayer filed a timely petition for rehearing, with

suggestion for rehearing en banc. That petition was denied January 25, 1993.

The opinions of the District Court and of the Court of Appeals appear in the appendix to this Petition.

JURISDICTIONAL STATEMENT

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254. The Court of Appeals Opinion was filed October 13, 1992. On October 27, 1992, the Taxpayer filed a timely petition for rehearing before the United States Court of Appeals for the Seventh Circuit. That petition for rehearing contained a suggestion for rehearing en banc. The petition was denied January 25, 1993. Pursuant to 28 U.S.C. 2101(c) and United States Supreme Court Rules 13.1 and 13.4, the present petition is timely and appropriate for consideration by this Court. By operation

of Rule 13.4, the time for filing of this Petition runs from January 25, 1993, the denial of the petition for rehearing.

The jurisdiction of the District Court was invoked pursuant to 26 U.S.C.§1340 and §1345.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 26 U.S.C. 6502(a):

> Where the assessment of any tax imposed by this title has been made within the period of limitations properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun--
>
> (1) within 6 years after the assessment of the tax, or
>
> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period....

2. Treasury Regulation 3.01.6502-1(a)(2)(i):

The 6-year period limitation on collection after assessment of any tax may, prior to the expiration thereof, be extended for any period of time agreed upon in writing by the taxpayer and the district director. The extension shall become effective upon execution of the agreement by both the taxpayer and the district director.

3. Treasury Regulation 301.7122-1(a):

...(T)he Commissioner may compromise any civil or criminal liability arising under the internal revenue laws prior to reference of a case involving liability to the Department of Justice for prosecution or defense. Any such liability may be compromised only upon one or both of the following grounds:

(1) Doubt as to liability; or

(2) Doubt as to collectability.

No such liability will be compromised if the liability has been established by a valid judgment or is certain and there is no doubt as to the ability of the Government to collect the amount owing with respect to liability.

STATEMENT OF THE CASE

On December 25, 1972, the Secretary of the Treasury assessed the Taxpayer $573,563.63 for tax deficiencies for the years 1962, 1964, 1965, 1966 and 1967. This assessment was made pursuant to a decision of the United States Tax Court, rendered August 21, 1972.

The statute of limitations applicable to collection of such taxes, is set forth in 26 U.S.C. 6502(a):

> Where the assessment of any tax imposed by this title has been made within the period of limitations properly applicable thereto, such tax may be collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun-
>
> (1) within 6 years after the assessment of the tax, or
>
> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period....

Treasury Regulation ("T.R.") 301.7122-1(a) provides for possible compromise of a claimed tax liability upon one or both of two grounds: (1) that there is a doubt as to liability for the tax; and (2) that there is a doubt as to collectability of the tax.

On June 6, 1977, an offer in compromise, based on a "doubt as to liability" (the "1977 offer") was submitted. The printed form on which the offer was made includes a waiver of the statute of limitations. By letter dated March 23, 1978, the 1977 offer was rejected by the IRS, which stated that it had no authority to accept the offer in compromise based on "doubt as to liability" when a Tax Court decision had already been rendered. The Government's manual requires that such an offer be

summarily rejected under these circumstances.

On December 27, 1987, the Government filed a complaint seeking judgment against the Taxpayer for the claimed unpaid taxes. The Taxpayer answered and raised the defense of the expiration of the statute of limitations as to the taxes assessed on December 25, 1972. The Taxpayer argued first that there was no waiver of the statute of limitations by the Taxpayer in the 1977 offer, and second, that any such waiver would have been legally ineffective, so that summary judgment should be entered in his favor. Regarding the legal validity of the waiver, even had it been included with the 1977 offer, the Taxpayer argued that since the waiver was given in exchange for the Government's agreement to consider the 1977 offer, and

the Government could not, by its own rules, consider the offer, the waiver was a nullity.

The Government argued, in support of its motion for summary judgment, that the Taxpayer had waived the statute of limitations in his 1977 offer. However, the Government had destroyed the 1977 offer. The Government produced neither the original offer nor a copy. Nor did the Taxpayer have a copy to produce.

The District Court granted summary judgment in favor of the Government and against Taxpayer. The Taxpayer filed a timely motion to alter or amend the judgment pursuant to F.R.C.P. 59(e).

Attached to an addition to this motion was the Taxpayer's affidavit, and the affidavit of Andre Zigoris, recounting Mr. Zigoris' recent discovery of a copy of

the original 1977 offer. The District Court considered the submission as a motion to re-open judgment because of newly discovered evidence, pursuant to F.R.C.P. 60(b)(2).

The copy of the 1977 offer showed that the waiver of the statute of limitations had been crossed out of the printed form, indicating that the Taxpayer did not agree to extend the statute of limitations.

On July 11, 1991, the District Court, despite this copy of the 1977 offer, refused to vacate the summary judgment entered in the Government's favor. The District Court held that the Taxpayer did not exercise due diligence in locating the 1977 offer, reasoning that the "evidence was within the reach and control of the defendant and allegedly located within his

own files." On October 13, 1992, the United States Court of Appeals affirmed the District Court.

The Court of Appeals explained that the Taxpayer's "argument relies heavily upon contractual principals, which we have indicated have no place in determining the validity of the waiver." United States v. McGaughey, 977 F.2d 1067 (7th Cir. 1992) Concerning the Taxpayer's reliance on Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955) (practically conclusive evidence may require a new trial if proper diligence was not used to secure the evidence during the trial), the Court of Appeals declined to apply Ferrell, and stated that the "rule does not appear to have been formally adopted in this circuit." McGaughey, 977 F.2d at 1076 .

Jurisdiction was conferred upon the United States District Court for the Southern District of Illinois by 26 U.S.C. §7402(a) and by 28 U.S.C. §1340 and 1345.

ARGUMENT

I. THE CASES RELIED UPON BY THE COURT OF APPEALS, SHOULD BE OVERRULED OR CLARIFIED, TO THE EXTENT THAT THEY HOLD THAT A TAXPAYER'S AGREEMENT TO WAIVE A STATUTORY RIGHT, IN EXCHANGE FOR A PROMISE BY THE GOVERNMENT TO DO SOMETHING IN RETURN, CREATES AN ENFORCEABLE WAIVER EVEN THOUGH THE GOVERNMENT'S PROMISE IS MERELY ILLUSORY.

This case offers this Court the opportunity to overrule, or at least to clarify, the broad holdings of Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930), and Stange v. United States, 282 U.S. 270 (1931). While the statement in Florsheim and Stange that a waiver itself is not a contract is true, the taxpayer submits that a waiver can be part of a contract when it is given in

exchange for, or in consideration of, the promise by another to take certain actions. This Court should take this opportunity to overrule Florsheim and Stange, insofar as is necessary to avoid the clear unfairness to the taxpayers of this country that arises when the Government can induce a taxpayer to waive the statute of limitations by appearing to promise something in exchange for the waiver when, in fact, the Government's promise is a sham or illusory.

This Court should overrule Florsheim and Stange, to the extent that those cases may seem to have held that, because a waiver is not a contract, but a voluntary unilateral waiver of a defense, the Government can make an illusory promise to a taxpayer in order to induce the taxpayer to execute the waiver. Because such a

result is clearly unfair, such a rule should be overruled.

In the alternative, this Court should further clarify Florsheim and Stange to limit Florsheim and Stange to those situations where a party intended a voluntary waiver, one freely given without consideration.

By clarifying Florsheim and Stange this Court will also resolve inconsistent applications of the rule of those cases among the circuits. As stated by the Court of Appeals, contract principles have been utilized by some circuits in analyzing waivers, explaining that "courts have, in limited contexts, utilized contractual analysis to solve problems related to waivers[.]" McGaughey, 977 F.2d at 1072. However, the Court of Appeals declined to do so in this case.

In United States v. Harris Trust & Sav. Bank, 380 F.2d 285 (7th Cir. 1968), the Seventh Circuit adopted the reasoning of the Eighth Circuit, which had used contract principles to resolve the very question at issue in this case. The Harris court, considering paragraph 6 of IRS Form 656 (the paragraph regarding waiver of the statute of limitations in the Government's form for offers in compromise), held:

> The purpose of the suspension clause of Item 6 and of the Treasury Regulation is to allow the Government a reasonable time to consider offers, without prejudicing its right to collect the tax as a result of this consideration. As pointed out in United States v. Havner, 101 F.2d 161 (8th Cir. 1939), the suspension of the statute of limitations is the quid pro quo for the Government's considering a compromise offer. Judge Sanborn explained (at 63): "The taxpayer, in submitting such an offer and waiver, in effect requests the Government to withhold attempts to collect the tax while the offer is pending, and, in consideration of

> this forbearance on the part of the Government, consents to forego the benefit of having the statute of limitations run while his offer of settlement is pending."

Harris Trust, 390 F.2d at 288.

The Taxpayer submits that the Court of Appeals' decision regarding his waiver of the statute of limitations, in the context of 26 U.S.C. §6502(a) and 26 C.F.R. §301-6502.1(2), is in conflict with the same court's decision in Harris.

In the instant case, the same Court of Appeals which recognized the appropriateness of the use of contract principles in Harris, held:

> Even if the IRS' ability to accept the offer was proscribed by law, and even if this waiver would be invalid if contract principles were applied, the waiver is valid because contract principles do not apply and because the IRS did consider the offer, even though its rejection was preordained.

McGaughey, 977 F.2d at 1073. The Taxpayer respectfully submits that the court below

both declined the use of contract principles and then improperly applied contract principles, in deciding this case. The decision conflicts with Harris and with logic.

The Court of Appeals suggests that "McGaughey agreed to suspend the statute of limitations, and the IRS agreed to consider his offer." McGaughey, 977 F.2d at 1073. However, the IRS clearly did not consider the offer, because it could not do so.

T.R. 301.7122-1(a) provides:

> . . . [T]he Commissioner may compromise any civil or criminal liability arising under the internal revenue law prior to reference of a case involving liability to the Department of Justice for prosecution or defense. Any such liability may be compromised only upon one or both of the following grounds:
>
> (1) Doubt as to liability; or
>
> (2) Doubt as to collectability.

> No such liability will be compromised if the liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect the amount owing with respect to liability.

Here there was no doubt as to liability, because a judgment had been entered. Therefore, an offer in compromise based on doubt as to liability should not have been accepted, because any agreement by the Government to give such an offer true consideration was illusory. The Government could not, and did not, "consider" the Taxpayer's offer. "Consider", means "to deliberate upon; examine; study." THE AMERICAN HERTIAGE DICTIONARY 284 (New College Edition 1981). Because rejection of the Taxpayer's offer was preordained, the Government could not have deliberated or studied the offer.

Therefore, the apparent agreement was illusory. A promise which the promisor is legally forbidden to make is no promise at all. It is said to be an illusory promise and furnishes no consideration. Williston, Williston on Contracts, §103, at 388-389 (3rd Ed. 1957). Had the lower court properly applied contract principles, the court would have held the 1977 offer ineffective for lack of consideration.

The United States Tax Court has also relied on contract principles in assessing waivers. In Giffin v. Commissioner of Internal Revenue, T.C. Memo. 1992-253 (1992), the court considered "whether the statute of limitations under section 6501 bars the assessment and collection of petitioners' 1982 Federal income tax

deficiency." In answering this issue, the Giffin court explained:

> A taxpayer's consent to extend the period of time for assessment of an income tax beyond the statute of limitations is a unilateral waiver of a defense. The agreement is not a contract. [citations omitted.] However, contractual principles are significant because section 6501(c)(4) requires that the parties reach a written agreement as to the terms of the extension.

Giffin, T.C. Memo. 1992-253. (Emphasis added.) Although the agreement in Giffin differs from the 1977 offer in this case, both included possible extension of the statute of limitations.

Kronish v. Commissioner of Internal Revenue, 980 T.C. 684 (1988), also applied a quid pro quo analysis. In Kronish, the court considered a Form 872 entitled "Consent to Extend the Time to Assess Tax." The court first cited Stange and stated "a consent to extend the period of

limitations on assessment is not a contract." Kronish, 980 T.C. 684. Thereafter, the court recognized that the use of contract principles was appropriate and relied on Williston. "It is the objective manifestation of mutual assent as evidenced by the parties' overt acts, not the parties' secret intentions, that determines whether the parties have made an agreement." Kronish, 980 T.C. 684, (citing 1 S. Williston, Contracts, secs. 22 and 35 (3d Ed. 1957)).

Because of the holdings in Florsheim and Stange, the trial and appellate courts have been constrained to point out that "waivers" are not "contracts". Yet some courts go on to analyze the execution of waivers in light of contract principles, clearly in an attempt to honor the intentions of the parties to exchange one

promise for another. Therefore, the Taxpayer respectfully asks this Court to clarify this area of the law, and to overrule Florsheim and Stange to the extent that they appear to hold that a taxpayer's waiver of the statute of limitations, ostensibly given in exchange for the Government's promise to do something in exchange, is effective even though the Government's promise is illusory. Thus, the Court will enable a straight-forward analysis, based on the specific wording of the individual agreements between taxpayers and the Government.

II. THE TAXPAYER EXERCISED DUE DILIGENCE IN ATTEMPTING TO LOCATE THE 1977 OFFER.

The Taxpayer exercised due diligence in searching for the original 1977 offer, and therefore pursuant to F.R.C.P.

60(b)(2) the Taxpayer should have been relieved of the judgment against him. There are eight prerequisites to the re-opening of a judgment pursuant to Rule 60(b)(2), only one of which the district court found wanting, due diligence. Because the district court misapprehended the facts surrounding the Taxpayer's diligence and the Court of Appeals relied on this misapprehension, the Court of Appeals erred in its holding.

The Court of Appeals stated:

> [G]iven the importance of the document, one would have expected McGaughey to search all of his papers. The fact that the document was in McGaughey's possession throughout the pendency of the proceedings below further belies McGaughey's claim of diligence. McGaughey, 977 F.2d at 1075.

The above is at odds with the affidavit of the Taxpayer's stepson, Andre Zigoris, the

person who found the copy of the 1977 offer.

In his affidavit Mr. Zigoris stated he "found three old, dusty folders on or about April 16, 1991, which appeared to be unrelated to old boxes in which they were found," and that the 1977 offer was found in one of the folders. Mr. Zigoris stated he was searching files belonging to Guy McGaughey, Sr., J.E. McGaughey, McGaughey & McGaughey, Ltd., and the files of Guy E. McGaughey, Jr. (the Taxpayer), from Mid-City Mall. Mr. Zigoris' affidavit does not specifically state the 1977 offer was found within the Taxpayer's papers, or within his possession.

Consequently, the district court could not have based its finding that the 1977 offer was in the Taxpayer's possession or among his files on the

evidence. Therefore, the Court of Appeals misapprehended the facts in affirming the district court.

III. THE COURT SHOULD ADOPT AND ENDORSE THE "FERRELL RULE."

However, even if there had been a lack of due diligence, the judgment should have been vacated. The Court of Appeals failed to apply the so-called "Ferrell Rule," an important exception to Rule 60(b)(2). Where the evidence is virtually determinative of the merits of the litigation, a lack of due diligence need not preclude the introduction of the new evidence. Ferrell v. Trailmobile, Inc., 223 F.2d 697, 698 (5th Cir. 1955).

This case offers this Court the opportunity to examine Ferrell and the Rule. The Ferrell Rule is an exception to the "due diligence" requirement of a 60(b)(2) motion. F.R.C.P., 28 U.S.C.A.

> If, in fact, practically conclusive evidence shows that the appellant had actually paid all eighteen installments...it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice. In such a case, the ends of justice may require granting a new trial even though proper diligence was not used to secure such evidence for use at trial.

Ferrell, 223 F.2d at 698. Although several circuits have considered Ferrell, there is a lack of clarity among the circuits as to the rule's standing.

The "Ferrell Rule" has been cited by the Second Circuit (United States v. Philatelic Leasing, Ltd., 794 F.2d 781, 788 (2nd Cir. 1986)), the Third Circuit, (Niedland v. United States, 338 F.2d 254, 260 (3rd Cir. 1964)), and the Eleventh Circuit, (Shook & Feltcher Insulation Company v. Central Rigging & Contracting Corporation, 684 F.2d. 1383, 1385 (11th Cir. 1982)). The Seventh Circuit in the

case below declined to adopt the rule. McGaughey, at 977 F2.d at 1076.

Because the "Ferrell Rule" is an important exception to the requirement of due diligence, this Court should finally decide the rule's validity and applicability and should hold that the rule is applicable here.

CONCLUSION

This case merits consideration by this Court to resolve the inconsistencies reached in the cases regarding taxpayers' waivers of statutory rights and to announce the Court's acceptance or rejection of the Ferrell rule.

Respectfully submitted,

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App. 1

THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
v.)
)
GUY E. McGAUGHEY, JR.,)

Defendant.

CAUSE NO. 90-3475-WDS

MEMORANDUM AND ORDER

STIEHL, District Judge:

This matter is before the Court on cross-motions for summary judgment. The motions revolve around three central questions: (1) whether the defendant agreed to waive the statute of limitations on collection of taxes pursuant to 26 U.S.C. § 6502(a) as part of an "offer in compromise"; (2) whether the United States accepted that waiver; and (3) whether the United States timely filed this action.

The United States filed its single-court civil complaint in this Court against the defendant, seeking judgment against the defendant for $2,386,068 plus statutory interest for tax assessments made against the defendant in the years 1972 and 1977.

BACKGROUND

In December of 1972 the Secretary of the Treasury, in accordance with an August, 1972 tax court decision, assessed the defendant for tax deficiencies for tax years 1962, 1964, 1965, 1966 and 1967.

In June of 1977, the defendant submitted an "offer in compromise" based on "doubt as to liability" for the assessed years and for the years 1968-1972. The defendant asserts that he is entitled to summary judgment because the

offer, and its contents, which was rejected by the IRS in March, 1978, are no longer available as evidence, either on Form 656 or by letter. Due to an apparent routine destruction of documents, the plaintiff has not been able to locate the offer which forms the basis for its assertion that the defendant has waived the statute of limitations. In addition, defendant asserts, even assuming the existence of his waiver (which tolled the statute of limitations), the waiver was not valid. He contends that as a general theory the Court should consider an offer in compromise to constitute a contract between the taxpayer and the government. Then defendant claims that the "contract" in this case was invalid because the IRS did not have the authority to consider the offer, thereby rendering the "contract"

illusory. Thus, defendant asserts no contract or enforceable agreement was created, and defendant's waiver did not apply. Defendant further asserts that even if the waiver were valid in 1977, the latest date action could have been taken against him was October 22, 1986, which defendant claims was one year from the date of the government's final rejection. Finally, the defendant asserts that the government is estopped from relying on defendant's waiver, because the IRS misrepresented information to the defendant's detriment.

Plaintiff claims that it is entitled to summary judgment because, although it acknowledged that defendant's original Form 656, which allegedly contained the taxpayer's waiver of the statute of limitations, was destroyed in an ordinary

agency destruction of documents, it has presented secondary evidence pertaining to standard and mandatory processes within the IRS which must have been followed for the IRS to have even considered defendant's offer of settlement. As a result, the government points to defendant's unilateral waiver of the statute of limitations in Form 656 as dispensing with all need for finding of fact, and settles the dispute as a matter of law.

Fed. R. Civ. P. 56(c) provides that a district court shall grant summary judgment "if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a

matter of law." In determining whether a district court properly granted summary judgment, "[a]all factual inferences are to be taken against the moving party and in favor of the opposing party." International Admin., Inc. v. Life Ins. Co. of N. Am., 753 F.2d 1373, 1378 (7th Cir. 1985). In instances in which "inferences contrary to those drawn by the trial court might be permissible," a district court's grant of summary judgment must be reversed. Munson v. Friske, 754 F.2d 683, 690 (7th Cir. 1985). Once a motion for summary judgment has been made and properly supported, however, the nonmovant does have the burden of setting forth specific facts showing the existence of a genuine issue of a material fact for trial. See Rule 56(e); Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert.

denied, 464 U.S. 960 (1983), (noting that "a bare contention that an issue of fact exists is insufficient to raise a factual issue"). Although a requisite, the existence of a factual dispute, nonetheless, is not, standing alone, sufficient to bar summary judgment. It is well settled that a "factual dispute does not preclude summary judgment unless. . . the disputed fact is outcome determinative under the governing law." Egger v. Phillips, 710 F.2d 292, 296 (7th Cir.), cert. denied, 464 U.S. 918 (1983), as cited in Shlay v. Montgomery, 802 F.2d 918, 920 (7th Cir. 1986).

DISCUSSION

The defendant claims that the government's failure to produce the original "offer in compromise," which included the defendant's original alleged

waiver of the statute of limitations, suffices as grounds for judgment in his favor. It is not disputed that the original copy of defendant's "offering compromise" was submitted to the IRS on June 6, 1977, and was rejected on March 2, 1978. But the original copy of Form 656 was destroyed as a result of standard IRS procedure for destruction of older documents. Without the production of this document, the original waiver and its subsequent acceptance by the government is called into question.

Fed. R. Evid. 10004(1) states: "The original is not required and other evidence of the contents of a writing, recording, or photograph is admissible if... all originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith." There is no

assertion that the document was destroyed in bad faith, or anything but the standard destruction of old materials. See, e.g. United States v. Conry, 631 F.2d 599, 600 (9th Cir. 1980), where the court determined that in those circumstances in which tax documents have been destroyed in good faith by the government, secondary evidence of the original may be acceptable. "In suits involving tax matters, as in cases presenting other issues, proof of the document through circumstantial evidence is appropriate under Fed. R. Evid. 1004, although in the absence of the document itself, the government bears the burden of showing that the waiver was validly executed." Id. at 600. In the case, the court upheld the waiver based upon the secondary IRS evidence. "The district court heard

evidence regarding normal practices of the IRS which established the likelihood that appellants had executed waivers extending the limitations period for assessment and collection of their unpaid taxes." Id. See also United States v. Miller, 584 F. Supp. 519 (D. Md. 1984) (evidence presented by the IRS in the absence of primary evidence or mandatory procedures used within the IRS office satisfied the government's burden of proof).

In this action, the plaintiff presented sworn affidavits of IRS employees attesting to standard procedures of the IRS with regard to a submission of an "offer in compromise." The evidence establishes that IRS procedures mandate that the taxpayer sign the Form 656, which contains a standard waiver of the statute of limitations, and that the IRS will not

consider the offer unless the taxpayer has signed the form. Even then, the form is not effective until accepted by the IRS by signature. Based upon the undisputed evidence presented by the IRS of the safeguards it uses to insure that Form 656 is properly completed before the offer in considered, the government has met its burden of proof. Defendant argues that even if the waiver of the statute of limitations were submitted to and accepted by the IRS, the waiver was void. Defendant claims that a "contract" was formed between the government and the defendant but that "contract" was illusory because the government, according to its own regulation, T.R. 301-7122(a), was forbidden to consider the "offer in compromise," because "liability has been established by a valid judgment." And the

IRS was thus powerless to accept the compromise, leading to the conclusion that no "contract" had been formed.

Contrary to defendant's contention, a waiver by a taxpayer of a statute of limitations, while the government considers the "offer in compromise" does not constitute a contract. The Supreme Court determined this when it ruled, "[a] waiver is not a contract, and the provision requiring the commissioner's signature was inserted for purely administrative purposes and not to convert into a contract what is essentially a voluntary, unilateral waiver of a defense by the taxpayer." Strange v. United States, 282 U.S. 270, 276 (1931). Therefore, the Court finds defendant's "contract" assertions to be without merit, and inapplicable to this matter.

The defendant also claims that even if the original waiver were determined to be valid based upon his last submission of "offer in compromise," the latest possible date which the government could have brought action was on October 22, 1986, and this suit was filed on December 22, 1987.

The defendant submitted his Fourth Amended "offer in compromise" to the IRS on October 8, 1982, which the government rejected on October 17, 1984. However, defendant submitted a written protest of the government's rejection on October 31, 1984. The government considered the defendant's written protest and appeal and made a final rejection of the offer on October 26, 1987. This suit was filed on December 22, 1987, within the statute of limitations. 26 U.S.C. § 6502(a). The

defendant's contention would have permitted him to file an appeal and protest of the rejected "offer in compromise," while at the same time re-starting the count-down of the six year statute of limitations during this consideration. The Court finds defendant's contention to be without merit, therefore, the government's filing of this action was timely.

Finally, the defendant alleges that the government is estopped from relying on the 1988 "offer in compromise" because in his discussions with the IRS, the defendant dealt exclusively with one Madge Garwood, an IRS Revenue Officer, and claims he was induced by her to make an offer based on "doubt of liability", which was ultimately rejected. This

inducement, the defendant alleges, led to the tolling of the statute of limitations.

The defendant's contentions are fatally flawed. Even assuming that the defendant had been mislead by an IRS misrepresentation, the misrepresentation would be only of law and not of fact. A misrepresentation of law is not a proper basis for a claim of estoppel. Automobile Club v. Commissioner, 353 U.S. 180,183 (1956).

Furthermore, even if the Court were to have found that the defendant could have asserted reliance on the IRS misrepresentation, there has been no showing that the reliance was to defendant's detriment. In fact, had he not submitted his "offer in compromise," it is most likely that the IRS would have

begun the collection process some fourteen years ago.

Thus, after protracted assessments and delays, which were sadly Dickensian in length, we are left with a lingering tax deficiency which dates as far back as 1962 (the same year as the Cuban Missile Crisis), which it is hoped will soon reach a merciful conclusion. Having found no issue of material fact necessary to be tried between the IRS and this defendant, the Court DENIES defendant's motion for summary judgment, and GRANTS plaintiff's motion for summary judgment. Judgment is entered in favor of the United states and against Guy E. McGaughey, Jr. in the amount of $2,386,068 plus statutory additions through March 31, 1991, for a total amount of $3,410,060.07 pursuant to 26 U.S.C. §§ 6621 and 6622. A complete

calculation of the statutory additions is attached hereto as Exhibit 1. The Clerk is directed to enter judgment accordingly.

IT IS SO ORDERED.

DATED: 1 April, 1991 .

DISTRICT JUDGE

TAXCOMP: COMPUTATION OF INTEREST
(Effective thru 06/30/91)

Due data of return : 12/31/87

Interest computed to : 03/31/91

Amount of tax on which interest is to be computed: 2,386,068.00

Period	Rate (%)	Type	#months	#days	Factor
01/01/88 - 03/31/88	:11	daily comp	0	91	0.027722941
04/01/88 - 09/30/88	:10	daily comp	0	183	0.051263917
10/01/88 - 12/31/88	:11	daily comp	0	92	0.028031819
01/01/89 - 03/31/89	:11	daily comp	0	90	0.027490274
04/01/89 - 06/30/89	:12	daily comp	0	91	0.030364776
07/01/89 - 09/30/89	:12	daily comp	0	92	0.030703526
10/01/89 - 12/31/89	:11	daily comp	0	92	0.028109676
01/01/90 - 03/31/90	:11	daily comp	0	90	0.027490274
04/01/90 - 06/30/90	:11	daily comp	0	91	0.027799928
07/01/90 - 09/30/90	:11	daily comp	0	92	0.028109676
10/01/90 - 12/31/90	:11	daily comp	0	92	0.028109676
01/01/91 - 03/31/91	:11	daily comp	0	90	0.027490274

Compounding factor on simple interest from 1/1/83	0.066467847
Total Interest Factor for 1186 days=	0.429154605

Amount in which interest was computed: 2,386,068.00

Interest on Tax on 2,386,068.00 computed from 12/31/87 to 03/31/91 (a total of 1186 days)	1,023,992.07
Total Tax and Interest:	3,410,060.07

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

UNITED STATES OF AMERICA,	)
	)
Plaintiff,	)
v.	)
	)
GUY E. McGAUGHEY, JR.,	)
	)
Defendant	)

CAUSE NO. 90-3475-WDS

MEMORANDUM AND ORDERS

STIEHL, District Judge:

Before the Court is defendant's motion to alter or amend judgment pursuant to Fed. R. Civ. p. 59(e), and defendant's additions and supplemental affidavits requesting this Court to grant a new trial and vacate its order of summary judgment in favor of plaintiff.

Following a grant of summary judgment in favor of plaintiff and against defendant on April 1, 1991, defendant submitted a timely motion to alter or

amend judgment pursuant to Fed. R. Civ. P. 59(e). In addition, this Court granted defendant a thirty day extension in order to file affidavits in support of this motion. Defendant, within the thirty day period, filed: (1) a supplemental affidavit in support of defendant's motion to alter or amend judgment; and (2) an affidavit in support of defendant's motion to alter or amend judgment. The supplemental affidavit is an extension of various arguments presented in the original motion; therefore, it should be construed as a 59(e) motion to alter or amend a judgment. In contrast, the affidavit in support of defendant's motion is not in fact in support of the original motion, but is a new request for the Court to review the case in light of the "discovery" of previously unknown

evidence. This second affidavit will, therefore, be reviewed pursuant to Fed. R. Civ. P. 60(b) (2) which states:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons... (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b).

Defendant's supplemental affidavit in support of his motion to alter or amend judgment simply contains repetitions of, or variations on arguments which were previously raised by the defendant and which were subsequently considered and rejected by this Court. This affidavit is nothing more than a sheep in sheep's clothing. Nothing new is raised, and the Court remains unpersuaded by defendant's assertions. Accordingly, defendant's motion for leave to alter or amend

judgment pursuant to Fed. R. Civ. P. 59(e). is DENIED.

Defendant's affidavit in support of his motion to alter or amend judgment recounts defendant's step-son's recent "discovery" of a copy of the originally submitted "offer in compromise". This "offer" and its destruction by the government in a routine house cleaning, was the subject of analysis by this Court in its Order granting summary judgment in favor of plaintiff. The "offer" was allegedly discovered when defendant's step-son was searching the attic of the McGaughey building for unrelated materials. The discovery occurred two weeks after this Court ruled against defendant, 4½ years after plaintiff initiated this action against defendant, and 14 years after defendant originally

submitted this "offer in compromise" to the Internal Revenue Service. Of particular note is the fact that at various times during these protracted proceedings defendant had claimed that he had never, in fact, received a copy of this document.

The Seventh Circuit has set forth an eight part test for extraordinary relief under Fed. R. Civ. P. 60(b)(2):

> 1) The evidence was in existence at the time of trial or pertains to facts in existence at the time of trial;
>
> 2) It was discovered following trial;
>
> 3) Due diligence on the part of the movant to discover the new evidence is shown or may be inferred;
>
> 4) The evidence is admissible;
>
> 5) It is credible;
>
> 6) The new evidence is material;
>
> 7) It is not merely cumulative or impeaching; and finally,

8) The new evidence is likely to change the outcome.

Mumford v. Brown, 814 F.2d 328, 330 (7th Cir. 1986), citing United States v. Walus, 616 F.2d 283, 287-88 (7th Cir. 1980).

As noted earlier, defendant at various times has denied ever having received the "offer in compromise." It, therefore, is difficult to characterize defendant's actions throughout this entire fourteen or four and one-half year process as anything approaching "due diligence." This piece of evidence was within the reach and control of the defendant and allegedly located within his own files. There is no satisfactory explanation offered for this delay, or of defendant's failure to properly review all material within his control, or if he never received it, how it found its way into his

files. This Court finds that defendant did not exercise due diligence in attempting to discover this "offer in compromise." Therefore, defendant's motion to re-open judgment pursuant to Fed. R. Civ. P. 60(b)(2) is DENIED.

Accordingly, defendant's motion to alter or amend judgment is DENIED.

IT IS SO ORDERED.

DATED: 10 July 1991

_____

DISTRICT JUDGE

In the
United States Court of Appeals
For the Seventh Circuit

No. 91-2864
UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
GUY E. McGAUGHEY Jr.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division. No. 90 C 3475-William D. Stiehl, Chief Judge.

ARGUED MAY 18, 1992-DECIDED OCTOBER 13, 1992

Before CUDAHY and MANION, Circuit Judges, and Gibson, Senior Circuit Judge.[1]

GIBSON, Senior Circuit Judge. Guy McGaughey, Jr. appeals the district court's grant of summary judgment in favor of the government in its suit on a tax-related debt. We affirm.

[1]The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

I. BACKGROUND

On December 25, 1972, the Secretary of the Treasury assessed McGaughey approximately $600,000 for tax deficiencies. This assessment was based on a Tax Court decision rendered on August 21, 1972.[2] At some time not specified in the record, Internal Revenue Agent Madge Garwood was assigned the task of collecting this deficiency.

McGaughey submitted an offer of compromise based on "doubt of liability." This offer was submitted, as required by IRS regulations, on Form 656. Form 656 contains, *inter alia*, a clause indicating the taxpayer agrees to suspend the statute of limitations for collecting tax

[2]Neither the merits of the Tax Court's decision nor the merits of the deficiency are the subject of this appeal.

deficiencies during the time in which the offer is being considered, and, if the offer is ultimately rejected, for one year after the rejection. This offer was ultimately rejected because Treasury Regulations forbid the acceptance of an offer of compromise based on doubt of liability when the issue of liability has previously been determined by the Tax Court. McGaughey then filed a series of offers of compromise based on "doubt as to collectibility;" the last offer was submitted in October 1982. All of these offers were submitted on Forms 656, and all of these offers were rejected.

In December 1987, the government filed a complaint in district court seeking a judgment in the amount of the

deficiency plus interest.[3] Both parties filed motions for summary judgment. The Form 656 used to submit McGaughey's initial offer of compromise was not offered to support either party's motion because it no longer existed; in accordance with IRS procedures, all Forms 656 are destroyed eight years after they are rejected. In support of his motion, McGaughey submitted an affidavit contending Garwood induced him to make an offer of compromise based on doubt as to liability by telling him that she did not think he owed the money and that an offer of $10,000 was likely to be accepted. He also averred that he did not recall filling out a Form 656.

In support of its motion, the

[3]The total amount sought was in excess of $2.3 million.

government presented secondary evidence to prove the prior existence of the Form 656 and the execution of the waiver of the statute of limitations. If the Form 656 , including the waiver, was filled out properly, it was then sent to a Service Center; if it was not, the form was returned to the taxpayer without being considered and without further processing. McGaughey's offer of compromise, which was filed with the Louisville District Director, would have been sent to the Memphis Service Center.

There, information would be entered into a computer and a Form 2515 prepared. Form 2515 is a control card that contains the name of the taxpayer, the time periods involved, the type of tax, the amount and terms of the offer, and other data pertaining to the offer of compromise.

After the form 2515 was prepared, a transcript of the taxpayer's account, including tax returns, was ordered, and the entire file would be returned to the District Director. Upon its return to Louisville, the Form 656 would be examined for completeness and accuracy. If the Form was complete and accurate, it would be forwarded for further consideration. Once a decision was made to either accept or reject the offer, the file would be sent back to the Memphis Service Center, where computer entries reflecting that decision would be made.

In addition to affidavits describing this process, the government presented copies of the Form 2515 for McGaughey's offer of compromise, which indicate that the statute of limitations was waived and that the waiver had been accepted. The

government also introduced copies of memos indicating the file was transferred between Louisville and Memphis. Based on the documents presented to it, the district court concluded McGaughey had filled out a Form 656, that the waiver of the statute of limitations had been executed by both McGaughey and a representative of the IRS, and that the series of offers McGaughey subsequently filed had extended the statute of limitations to the point that the instant suit was not time-barred. Thus, the district court granted the government's motion for summary judgment and denied McGaughey's.

Approximately fifteen days after judgment was entered, McGaughey's stepson found a copy of what appears to be the Form 656 McGaughey used to submit his

offer of compromise based on doubts as to liability. The document was signed by both McGaughey and Garwood, but the clauses purporting to suspend the statute of limitations had been crossed out. McGaughey presented this newly found document as an additional ground in his already-pending motion to amend or alter the judgment.

The government responded by filing an affidavit in which Garwood acknowledged her signature on the document McGaughey's stepson had found, but contended that she would never have signed a Form 656 containing a waiver clause that had been crossed out. She further stated that if she had signed such a Form 656, it would have been returned to her immediately as it would have contained an improperly executed waiver clause. The district

court declined to consider the new evidence, stating that McGaughey had not demonstrated due diligence in locating the document. McGaughey appeals.

II. DISCUSSION

The key to this case depends upon the existence and validity of the waiver contained in the first offer of compromise. If the first offer contained a valid waiver, the statute of limitations was further extended by the subsequent offers and the government's lawsuit is not time-barred. If, on the other hand, the waiver in the initial offer was nonexistent or invalid, there would be nothing for the subsequent waivers to extend. The burden of proving the existence and validity of the waiver lies with the government. United States v. Borchardt, 470 F.2d 257, 261 (7th Cir.

1972). We review the court's grant of summary judgment de novo, and affirm if, after granting the non-moving party all reasonable inferences from the supporting documents, there is no genuine issue of material fact. Continental Corp. v. Aetna Casualty & Sur. Co., 892 F.2d 540, 543 (7th Cir. 1989). With these principles in mind, we examine McGaughey's challenges to the district court's grant of summary judgment.

A. The Missing Original Form 656

The contents of McGaughey's initial offer are the focus of this dispute, and the optimal proof of the contents is the original document. Fed. R. Evid. 1002. However, "[t] he original is not required, and other evidence of the contents of a writing...is admissible if [a]ll originals are lost or have been destroyed, unless

the propcnent lost or destroyed them in bad faith...." Fed. R. Evid. 1004.

Of course, before secondary evidence may be used, it must be demonstrated that the original has actually been destroyed. Unless someone testifies that he or she personally destroyed or witnessed the destruction of a document, such proof will ordinarily be circumstantial. In this case, the district court received affidavits describing the IRS' procedures requiring the destruction of Forms 656 after a specified period of time. The court also received an affidavit from Garwood, who indicated that her search for the document was futile and that she had been informed the document was destroyed. Based on this information, the district court found that the original had been destroyed.

McGaughey contends there was inadequate proof that a thorough search for the original was conducted. Rule 1004 does not contain an independent requirement that a search be conducted; rather, the concept of a diligent search is an avenue by which the larger issue of the document's destruction may be proved. See Harrington v. United States, 504 F.2d 1306, 1313-14 (1st Cir. 1974) (prerule case affirming district court's conclusions that inadequacies in search rendered proof of document's unavailability insufficient); 5 Weinstein's Evidence ¶ 1004(1)[05] at 1004-18 (1983) ("By far the most common means of prov[ing] loss or destruction is the use of circumstantial evidence showing a diligent but unsuccessful search and inquiry for the document.") (quotation

omitted); McCormick on Evidence, § 237 at 715 (3d ed. 1984) ("Loss or destruction may sometimes be provable by direct evidence but more often the only available evidence will be circumstantial, usually taking the form that appropriate search for the document has been made without discovering it."). These uncontradicted affidavits and documents amply demonstrated the original Form 656 was destroyed.

The secondary evidence offered by the government to prove that McGaughey and Garwood executed the waiver contained in the Form 656 included a detailed description of the procedures involved in processing an offer of compromise and the control cards and memoranda associated with this offer. These materials identified the steps of the process

McGaughey's offer underwent, and further indicated that the offer could not have reached those steps in the process if his offer was not on a Form 656 and if the waiver on the form was not validly executed. McGaughey argues the government's showing was insufficient because nobody specifically recalled the presence of the waiver on *his* offer of compromise. However, the Rules of Evidence do not establish a hierarchy of secondary evidence; anything that tends to demonstrate the writing's contents may constitute secondary evidence. McGaughey's argument goes to the weight, not the admissibility, of this secondary evidence. Based on the affidavits presented by the government, and McGaughey's failure to present any substantial evidence to contradict the

government's showing, the court's conclusion that McGaughey's initial offer of compromise included a waiver of the statute of limitations was not improper. Cf. United States v. Conry, 631 F.2d 599, 600 (9th Cir. 1980) (per curiam).

B Appropriateness of Summary Judgment

McGaughey contends summary judgment in favor of the government was unwarranted because the waiver was ineffective as a matter of law. He further contends that even if the waiver was effective, material questions of fact remained unresolved, rendering summary judgment improper. We reject each of these contentions.

1. Validity of the Waiver

A court proceeding to collect a tax must begin

> (1) within 6 years after the assessment of the tax, or

> (2) prior to the expiration of any period for collection agreed upon in writing by the Secretary and the taxpayer before the expiration of such 6-year period...

26 U.S.C. § 6502(a) (1988). Treasury regulations mirror the statute's statement that the limitation period may be extended by a written agreement. 26 C.F.R. § 301.6502-1(2). However, Treasury Regulations also prohibit any compromise of a tax liability "if the liability has been established by a valid judgment or is certain, and there is no doubt as to the ability of the Government to collect the amounts owing with respect to such liability." Id. § 301.7122-1 (a).

McGaughey argues the word "agreement" as used in both the statute and the regulations means "enforceable agreement;" to this conclusion he adds the observation that the agreement must be signed by both

the taxpayer and the Commissioner. From these premises, McGaughey argues contract principles govern the enforceability of the waiver. He contends he agreed to extend the statute of limitations based on the IRS' agreement to consider his offer of compromise; however, because the IRS could not accept his offer due to the operation of § 301.7122-1 (a), its promise to consider his offer was illusory and his agreement to extend the statute of limitations is unenforceable. McGaughey's argument is defeated in his initial premise: contract principles do no govern this case.

In Florsheim Bros. Drygoods Co. v. United States, 280 U.S. 453 (1930), the Supreme Court held that waivers of the statute of limitations on collecting tax deficiencies are not contracts. Id. at

466; see also Stange v. United States, 282 U.S. 270, 276 (1931) ("[A] waiver is not a contract, ... [but] is essentially a voluntary, unilateral waiver of a defense by the taxpayer."). The Florsheim Bros. Court was faced with arguments very similar to those advanced by McGaughey, and addressed them as follows:

> Stress is laid on the use of the words "agree" and "agreement" in the Acts and Regulations. But these are ordinary words having no technical significance. It is also urged that, unless a contract was intended, there is no reason why the consent of the Commissioner should have been required. But an otherwise plain meaning should not be distorted merely for the sake of finding a purpose for this administrative requirement.

280 U.S. at 466.

Though courts have, in limited contexts, utilized contractual analysis to solve problems related to waivers, no court has held that a waiver is a

contract. McGaughey attempts to support his position by referencing Rohde v. United States, 415 F.2d 695 (9th Cir.1969), a case in which the Ninth Circuit had to decide whether the word "agreement" required "that the Commissioner affirmatively assent to the waiver before it became effective [.]" Id. at 697. The court recognized a waiver is not a contract, *id.*, and concluded that "[t]rue 'agreement' does not mean 'contract' in this setting. It means expressed assent." Id. at 698. *Rohde's* holding does not help McGaughey.

McGaughey also gleans support from our decision in United States v. Harris Trust & Sav. Bank, 390 F.2d 285 (7th Cir. 1968). There, we stated that "the suspension of the statute of limitations is the *quid pro quo* for the Government's

considering a compromise offer." Id. at 288. In making this statement, we adopted the following explanation offered by the Eighth Circuit:

> "The taxpayer, in submitting such an offer and waiver, in effect requests the Government to withhold attempts to collect the tax while the offer is pending, and, in consideration of this forbearance on the part of the Government, consents to forego the benefit of having the statute of limitations run while his offer of settlement is pending."

Id. (quoting United States v. Havner, 101 F.2d 161, 163 (8th Cir. 1939)).

Harris Trust does not state that contract principles govern the validity of a waiver and, of course, it could not do so without directly contradicting the Supreme Court's decisions in Florsheim Bros. and Stange. We therefore resist any construction of Harris Trust that would place it in conflict with Supreme Court cases addressing this issue. With this in

mind, we believe the portions of Harris Trust upon which McGaughey relies should not be read in strict contractual terms. There was, in a non-technical sense, a quid pro quo: McGaughey agreed to suspend the statute of limitations, and the IRS agreed to consider his offer. Even if the IRS' ability to accept the offer was proscribed by law, and even if this waiver would be invalid if contract principles were applied, the waiver is valid because contract principles do not apply and because the IRS did consider the offer, even though its rejection was preordained.

2. Unresolved Questions of Material Fact

McGaughey contends unresolved questions of material fact precluded entry of summary judgment in favor of the government. The substance of the unresolved factual matters concern

representations Garwood made to him about the advisability of filing an offer of compromise based on doubt as to liability and about the likelihood that his offer would be accepted.

Though we agree that there is a factual dispute over these matters, we do not believe these facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). McGaughey posits two legal arguments based upon these facts, but neither argument affects the outcome of this case.

McGaughey first contends the facts

may demonstrate the existence of a misrepresentation sufficient to defeat the waiver. The argument relies heavily upon contractual principles, which we have indicated have no place in determining the validity of the waiver. By signing the waiver, McGaughey unilaterally surrendered any defense he might have under the statute of limitations. Even if McGaughey was induced to sign the waiver by false promises of certain compromise, he does not allege there were any misrepresentations about the substance of the waiver.

McGaughey's second argument is that Garwood's actions estop the government from asserting the waiver, thereby permitting McGaughey to assert the statute of limitations as a defense. Even if McGaughey's factual allegations about

Garwood's conduct are true, they do not permit estopping the government in this case. As a general matter, the party asserting estoppel against the government must not only satisfy the traditional elements of estoppel, but must also carry a heavy burden to outweigh the strong, countervailing interest in obedience to the law. Heckler v. Community Health Serv., 467 U.S. 51, 60-61 (1984). The proponent of estoppel must first demonstrate that the government's actions constitute "affirmative misconduct." United States v. Lair, 854 F.2d 233, 237-38 (7th Cir. 1988). Once this hurdle has been met, the proponent must satisfy the following four requirements:

> "First, the party to be estopped must know the facts. Second, this party must intend that his [or her] conduct shall be acted upon, or must so act that the party asserting estoppel has a right to believe it is so intended.

> Third, the party asserting estoppel must have been ignorant of the facts. Finally, the party asserting estoppel must reasonably rely on the other's conduct to his [or her] substantial injury."

Id. at 238 (quoting Portmann v. United States, 674 F.2d 1155, 1167 (7th Cir. 1982)). Assuming, without deciding, that the facts as alleged by McGaughey satisfy the initial hurdle and the first two additional elements, we hold that the facts viewed in the light most favorable to McGaughey fail to satisfy his burden on the latter two additional elements.

Our first concern focuses upon both McGaughey's ignorance of the facts (element three) and his reasonable reliance upon Garwood's conduct (element four). Initially, we note that Garwood did not misrepresent facts; she misrepresented the IRS' authority to accept McGaughey's offer. Consequently,

there was no "fact" of which McGaughey was unaware. Furthermore, "[j]ust as everyone is charged with knowledge of the United States Statutes at Large, Congress has provided that the appearance of rules and regulations in the Federal Register gives legal notice of their contents." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 384-85 (1947); see also Community Health Serv., 467 U.S. at 65-66. Inasmuch as McGaughey is charged with knowledge of the regulations (concededly, a legal fiction with which the individual is stuck), his reliance upon Garwood's representations cannot be considered reasonable.

Our second concern focuses on the lack of "substantial injury" suffered by McGaughey (element four). Initially, it is difficult to ascertain an injury; our difficulty is augmented by McGaughey's

failure to identify the harm he suffered. At best, he can claim to have been injured by having to pay more interest on the deficiency. However, interest payments are not punishment; they are designed to compensate the party entitled to the money for the time he has waited to receive the money. Furthermore, we note that McGaughey has contributed significantly to the increased interest; the offer of compromise at issue in this case was filed in June 1977 and was rejected in March 1978. Thereafter, McGaughey made a series of additional offers of compromise, the last of which was rejected in October 1982. This latter period of time is much longer than the delay caused by the initial offer of compromise, and was not induced by Garwood. Consequently, Garwood's actions did not cause McGaughey

sufficient harm to justify estopping the government.

To summarize, we conclude that even if McGaughey's allegations about Garwood's conduct are true, they do not present factual matters that would affect the legal issues in this case. Misrepresentation, being a contractual theory, has no application in analyzing the validity of the waiver. Moreover, McGaughey's allegations do not justify estopping the government from asserting the waiver. Consequently, the fact that these matters were not undisputed did not render summary judgment inappropriate.

C. Denial of the Motion to Reconsider

McGaughey contends the district court erred in denying his motion for relief under Fed. R. Civ. P. 60(b)(2), which permits the court to relieve a party form

a final judgment upon the discovery of "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)...." He contends the court erred in concluding he did not exercise due diligence in failing to locate the copy of his Form 656 and , even if the court was correct, the motion should have been granted because of the dispositive nature of the document.

1. Due Diligence

We have set forth a series of eight prerequisites to the granting of a Rule 60(b)(2) motion:

1) the evidence was in existence at the time of trial or pertains to facts in existence at the time of trial;
2) it was discovered following trial;
3) due diligence on the part of the movant to discover the new evidence is shown or may be inferred;

4) the evidence is admissible;
5) it is credible;
6) the new evidence is material;
7) it is not merely cumulative or impeaching; and , finally,
8) the new evidence is likely to change the outcome.

Mumford v. Bowen, 814 F.2d. 328, 330 (7th Cir. 1986). The district court identified only one factor wanting-the due diligence requirement.

[4] The court said that McGaughey

> at various times has denied ever having received the "offer in compromise." It, therefore, is difficult to characterize defendant's actions throughout this entire....four and one-half year process as anything approaching "due diligence." This piece of evidence was within the reach and control of the defendant and allegedly located within his own files. There is no satisfactory explanation offered for this delay, or of defendant's failure to properly review all material within his control, or if he never received it, how it found its way into his files.

[4] In doing so, the court did not mention the other requirements.

United States v. Mcgaughey, No. 90-3475-WDS, slip op. at 3-4 (S.D. Ill. July 10, 1991) (memorandum and order denying motion to set aside judgment).

"The decision of a district court declining to reopen a judgment under Rule 60(b) may be reviewed only for abuse of discretion,...and we have held that to find an abuse of discretion the court of appeals must conclude that no reasonable man could agree with the district court." Metlyn Realty Corp. v. Esmark, Inc., 763 F.2d 826, 831 (7th Cir. 1985) (quotations omitted). We believe the issue of McGaughey's diligence is a close one, but the deferential standard of review governing this issue convinces us the district court should be affirmed. McGaughey contends his search was diligent, that the document was not

located because it was filed among papers dealing with an unrelated matter, and he only claimed to have not received a copy of the Form 656 because of his inability to locate one. Despite these contentions, the district court's reasoning is not wholly without weight; given the importance of the document, one would have expected McGaughey to search all of his papers. The fact that the document was in McGaughey's possession throughout the pendency of the proceedings below further belies McGaughey's claim of diligence.

2. "Dynamite" Evidence

McGaughey argues that even if we affirm the district court's conclusion that he failed to exercise due diligence we should reverse the district court because the tardily discovered document is conclusive on the issue of the waiver's

existence. To support his position, McGaughey relies on Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955). Ferrell involved a foreclosure on a truck trailer; the dispute at trial centered on whether or not certain payments had been made. After judgment was entered in favor of the plaintiff,, the defendant found copies of the money orders used to make the disputed payments. The Fifth Circuit reversed the district court's denial of the defendant's Rule 60(b) motion, holding that if "practically conclusive evidence shows that the appellant had actually paid all eighteen installments for the purchase of the trailer, it is obvious that the judgment should be set aside to prevent a manifest miscarriage of justice. In such a case, the ends of justice may require granting a

new trial even though proper diligence was not used to secure such evidence for use at the trial." Id. at 698.

The Ferrell rule does not appear to have been formally adopted in this circuit. But see Gomez v. Chody, 867 F.2d 395, 407 (7th Cir. 1980) (Cudahy, J., dissenting in part) United States v. Walus, 616 F.2d 283 (7th Cir. 1980) contains language favorable to Ferrell's, but does not adopt the rule. See Id. at 304 (stating in dicta that even if the failure to secure evidence in time for trial "could be characterized as neglect,... we nevertheless cannot hold that the results of this trial are forever insulated form re-examination. In light of the strength of the new evidence, affirmance of the district court's decision would be to accept an evil far

greater than waste of the court's or litigant's time.") (quotation omitted).[5] We declined to formally adopt the Ferrell rule as the law of this circuit because even if it were the law, we would not reverse the district court in this case.

The Ferrell rule should be applied when the new evidence "is virtually determinative of the merits of the litigation." Gomez, 867 F.2d at 407 (Cudahy, J., dissenting in part). We are not persuaded that the document proffered by McGaughey represents the "dynamite" necessary to meet this standard. First, McGaughey has never alleged signing a Form

[5] We characterize this passage from Walus as dicta because the district court's justification for denying the Rule 60(b) motion was not lack of diligence, but "that the evidence against the defendant at trial was compelling and...the new evidence was not of the quality that justifie[d] vacating the judgment." Walus, 616 F.2d at 288.

656 with a waiver that had been crossed out; in fact, he has, through much of this litigation, denied ever signing a Form 656 with a waiver that had been crossed out; in fact, he has, through much of this litigation, denied ever signing a Form 656 in connection with his initial offer. Second, the lines that have been scratched out have not been initialed by the parties, as one might expect when an important document is altered in such an integral manner. Third, the only reason for Garwood to sign the Form 656 was to accept the taxpayer's waiver of the statute of limitations on behalf of the IRS; if the waiver had been crossed out, there would have been no need to sign the waiver (yet she did).

McGaughey correctly contends that if this document had been presented to the

district court in a timely manner summary judgment would have been inappropriate. Nonetheless, this is not the issue; the issue is whether the document causes us to believe, with virtual certainty, that judgement in favor of the government-regardless of whether it was obtained summarily or after trial-is incorrect. The concerns we have identified prevent us from believing, with required degree of certainty, that the underlying judgment is incorrect. Consequently, we affirm the district court.

III. CONCLUSION

We conclude the district court did not err in deciding that the original Form 656 had been destroyed, in considering secondary evidence of the form's contents, and in concluding that McGaughey did waive the statute of limitations. Contract

principles do not govern the validity of waivers, so the waiver was effective even if the IRS was foreclosed form accepting the offer. Furthermore, disputed questions of fact about possible misrepresentations did not prevent the entry of summary judgment because these factual matters were not relevant under the laws applicable to this case. Finally, the district court did not err in denying McGaughey's motion to set aside the judgment based on newly discovered evidence. Finding no error in the district court's treatment of this case, we affirm.

AFFIRMED

A true Copy:

Teste:

_____

Clerk of the United States Court
of appeals for the Seventh Circuit

United Sates Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

January 25, 1993.

Before
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. FLOYD R. GIBSON, Senior Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
No. 91-2864 v.
GUY E. McGAUGHEY, Jr.,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Illinois, East St. Louis Division. No. 90 C 3475-William D. Stiehl, Chief Judge.

O R D E R

On consideration of the petition for rehearing and suggestion for rehearing en banc filed in the above-entitled cause, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing and suggestion for rehearing en banc be, and the same is hereby, DENIED.

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*The Honorable Floyd R. Gibson, Senior Circuit Judge for the United States Court of Appeals for the Eighth Circuit, is sitting by designation.